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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 715

CLEVELAND LESTER THOMPSON, JR., EDWARD LEE HARSHBERGER and J. M. PROCTOR, JR.,
Petitioners

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Cleveland Lester Thompson, Jr., Edward Lee Harshberger and J. M. Proctor, Jr. pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit affirming their conviction for violation of Sections 371, 656, 1005, Title 18, United States Code, which relate to conspiracy to misapply bank funds, making false entries in bank books and embezzling bank funds.

Opinions Below

The District Court for the Southern District of Texas did not render an opinion in this case, in which a jury

acquitted the Petitioners of two counts of a seven-count indictment, but convicted them of the remaining counts. The opinion of the Court of Appeals affirming the conviction has not yet been reported, but is reproduced as Appendix "A" to this Petition.

Jurisdiction

The opinion (Appendix "A", R. 1852, 1860) and judgment (Appendix "B", R. 1861) of the Court of Appeals are dated December 14, 1959. A Petition for Rehearing (R. 1862-1864), timely filed, was denied on January 22, 1960 (R. 1869). The jurisdiction of this Court is invoked under Section 1254 (1), Title 28, United States Code.

Questions Presented

1. Whether the Court erred in refusing to make Grand Jury testimony of Elender Maynor available to Petitioners for use in cross-examination.
2. Whether the Trial Judge adequately instructed the jury on the law of the case.
3. Whether Petitioners were prejudiced by statements by the prosecutor in his summation which had no support in the record.

A.

Trial Court's refusal to grant inspection of Grand Jury minutes of testimony of Elender Maynor for use by Petitioners in cross-examination.

Mrs. Elender Maynor stated that she was employed by Petitioners as a skip tracer and office clerk (R. 318).

She stated that Petitioner, Thompson, was introduced to her by the other two Petitioners as "our silent partner." (R. 319) In addition to her other tasks, this witness stated that she kept the books, consisting of a common ledger and maintained a checkbook (R. 323). She stated that she first met Mr. Robert B. Parke, an FBI Agent (R. 1535) in July of 1957. Said Agent came to investigate the activities of some of these Petitioners with respect to repossession of certain automobiles (R. 381-383). Without consulting Petitioner Proctor, this witness disclosed the requested information by the FBI Agent, who stayed at Petitioner Proctor's place of business the greater portion of the morning (R. 383). She claimed that Mr. Proctor had told her it was all right to tell the FBI Agent what she had disclosed to the latter. That Agent Parke came to Petitioner Proctor's place of business where this witness was employed on several occasions (R. 383). The FBI Agent called this witness on a number of occasions (R. 384-385), and on every occasion that she met the FBI Agent she discussed the facts in this case. She did not disclose the conversations on every occasion that she had with the FBI Agent (R. 386). She prepared lists of motor vehicles that had been repossessed, at her home, and gave these lists to the FBI Agent, all at Mr. Parke's request, who wanted the lists "the next morning." (R. 387-389). In making up these lists and giving them to the FBI Agent, she took it upon herself "to exercise . . ." her "own judgment" and gave Mr. Parke, the FBI Agent whatever he wanted (R. 390-391).

The FBI Agent came down to Mr. Proctor's place of business on numerous occasions and inquired of this witness concerning certain automobiles involved in repossession and transactions had with the company (R. 391-392).

She did not know whether she discussed the facts in this case with the FBI Agent before she testified before the Grand Jury (R. 393).

She readily admitted that she was "not positive of anything" that she testified to (R. 405). She stated that the FBI Agent asked her to go to Corpus Christi if this litigation was tried there (R. 487).

At this juncture Petitioners made a timely motion for the production and inspection of the minutes of Elender Maynor's Grand Jury testimony, both under 18 United States Code, Section 3500 and pursuant to the procedure approved by the majority of the Circuit Courts (R. 487-488). The reasons for desiring Petitioner to inspect and use the transcript of Maynor's Grand Jury testimony, included the following:

1. Maynor was the essential prosecuting witness embracing activities of Petitioners.
2. Maynor's testimony relating to meetings and conversations was so vague as to dates and places that it was impossible to attack it by rebuttal evidence other than the testimony of Petitioners.
3. Maynor admitted "not being positive of anything," but vaguely referred to vitally important matters which certainly had their effect on the jury. Her trial testimony as a whole was replete with inconsistencies.

The prosecutor advanced no grounds for opposing Petitioners' motion other than that a proper foundation had not been laid, and that Section 3500, Title 18 and the *Jencks* case were inapplicable.

B.

Failure of the Court to properly charge the jury.

Prior to the trial judge instructing the jury, Petitioners requested the Court to define the terms "counsel" and "induce" (R. 1791). This the Trial Court refused because, as he stated: "I think the proper charge has been given on conspiracy and I believe this will be confusing. I deny No. 19 for that reason" (R. 1799).

Further, Petitioners requested the Court to charge the jury in accordance with the case of *Kassin v. United States*, 87 F. 2d 183, 184, which the Court refused (R. 1644, 1645).

Petitioners further requested the Court to instruct the jury on several matters relevant to the issues in this cause, supplemental transcript, pages 2-11, all of which was similarly disallowed by the Trial Judge.

C.

Prejudicial statements by the prosecutor in his summation which had no support in the record.

In his summation of the government's case to the jury, the prosecutor stated:

> "I have put a lot of time in this case. I have worked hard on it, but even so I sincerely ask you to go out and render what you consider a proper verdict. *I'll be frank with you, I think the verdict is guilty on all three, on all counts.*" (R. 1755)

The above and foregoing statement was the last and closing admonition to the jury by the prosecutor.

To this character of argument, Petitioners Harshberger and Proctor objected because it constituted a personal expression and personal opinion of the prosecutor, and was an invasion of the province of the jury. A motion for mistrial was made by these Petitioners as the result of said argument and statement, but the Trial Court overruled the objections of Petitioners and denied the motion for mistrial (R. 1757).

D.

The Trial and the Appeal.

Petitioners objected to the character of argument pursued by the prosecutor in summation of his case to the jury (R. 1757).

Petitioners timely requested the Trial Court to instruct the jury on several aspects of the charge of conspiracy which were overruled (Supplemental transcript, pages 2-11). Likewise, the trial court refused the request of Petitioners' counsel to define the terms "counsel" and "induce" (R. 1791), and further refused to charge the jury in accordance with the law stated in *[redacted] 183, 184*, dealing with the charge of conspiracy (R. [redacted]-1645).

The Fifth Circuit affirmed the judgment of the Trial Court (R. 1852-1860), with one Justice stating that he did

> "not think that the argument quoted in Footnote 2 to the majority opinion should be commended. For the prosecuting attorney to express his personal opinion or belief in the guilt of the accused seems to me unfairly to add on the government's side of the scales the weight of the professional opinion and the influence of the official position of government counsel who, in most cases, is properly and highly respected by the members of the jury for his integrity, fairness and impartiality." (R. 1859-1860)

REASONS FOR GRANTING THE WRIT

A.

Petitioners were entitled to Grand Jury testimony of Elender Maynor.

Petitioners' timely moved for the production and inspection of the minutes of Elender Maynor's Grand Jury testimony, both under United States Code, Section 3500 and pursuant to the procedure approved by the majority of the Circuit Courts. The Trial Court inspected the minutes in camera (R. 517), but refused to make such minutes available to Petitioners' counsel (R. 520).

The record is replete with reasons for entitling Petitioners to inspect and use the transcript of Maynor's Grand Jury testimony. Among these were that she was a most essential witness for the prosecution governing business transactions of her employees—the Petitioners. Her testimony with respect to meetings and conversations were so vague as to dates and places that it was impossible to attack it by rebuttal evidence other than the testimony of Petitioners. It is submitted that the trial testimony as a whole was replete with inconsistencies.

No grounds for opposing this motion was advanced by the prosecutor other than that Section 3500, Title 18 United States Code, and the *Jencks* case were inapplicable.

> "Maynor was the witness who gave the only direct evidence tending to show that Petitioners were guilty of the misconduct charged in the indictment. The jury could not convict unless it believed Maynor. Particulary significant was the fact that Maynor, at the trial, admitted that she was 'not * * * positive of anything."

This Court held in *Jencks v. United States*, 353 U.S. 657, 667:

> "Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistence. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

In the recent case of *United States v. Spangelet*, 258 F. 2d 338, it was held that while some reason must be shown

> "* * * by the Defendant to entitle him to inspect the minutes of the Grand Jury testimony of a government witness * * *. It is now abundantly clear that a defendant's access to the Grand Jury minutes does not depend on a showing that the witness' testimony was inconsistent with what he gave before the Grand Jury."

And,

> "Even if there were no showing of possible inconsistency in the testimony of a witness in a * * * case, or indeed in any case, where the testimony of such witness is the only direct evidence against the Defendant and no valid reason for secrecy exists, the Court should upon request examine the Grand Jury Minutes of such a witness for possible inconsistencies. * * * Surely the Defendant should have access to all conflicting testimony given under oath by the one direct witness who gives him the lie. It offends all sense of fairness to first require a showing of possible inconsistency preliminary to examination of the minutes by the Trial Judge."

United States v. Zborowski, 271 F. 2d 661, 666.

To the effffect, cf. *United States v. McKeever*, 271 F. 2d 669, 672.

The ruling of the lower Courts are in error because:

> "* * * after the Grand Jury's functions are ended, disclosure is wholly proper where the ends of justice require it."
>
> *United States v. Socony-Vacuum Oil Company*, 310 U.S. 150, 325.

It is understandable that any Trial Court may keep the Grand Jury Minutes secret where it is shown that it is necessary:

1. To prevent the escape of those who may be indicted;
2. To insure freedom to the Grand Jury in its deliberations and to prevent improper importuning of Grand Jurors;
3. To prevent subornation of perjury or tampering with witnesses who may testify before the Grand Jury or at the trial;
4. To encourage free and untrammeled disclosure of information by Grand Jury witnesses; and
5. To protect an innocent accused from publicity.

United States v. Rose, 215 F. 2d 617, 628-9.

In this litigation none of these reasons militated against making Maynor's Grand Jury testimony available to Petitioners after Maynor had testified. If any of Maynor's testimony related to matter as to which the veil of secrecy had not already been lifted at the trial, such portions could have been withheld.

As was stated in *United States v. Zborouski*, 271 F. 2d 661, 668:

> "The prosecutor must be vigilant to see to it that full disclosure is made at trial of whatever may be in his possession which bears in any material degree on the charge for which a defendant is tried. In the long run it is more important that the government disclose the truth so that justice may be done than that some advantage might accrue to the prosecution toward ensuring a conviction."

The Courts below committed reversible error in refusing to allow Petitioners to inspect and use the transcript of Maynor's Grand Jury testimony in cross-examination of the witness.

B.

Petitioners were entitled to a charge which fully and adequately instructed the jury on the law of the case.

That the accused in any criminal case is entitled to a full and adequate instruction relating to the law of the case is a right of the accused which is not open to question.

The indictment in this case, among other things, charged Petitioners with aiding, abetting, counseling, commanding, inducing and procuring each other to consummate the purpose of the purpose of the conspiracy and the things charged in the indictment (R. 16-22). The Trial Court, in part, instructed the Jury as follows:

> "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or

> procures its commission, is punishable as a principal and whoever wilfully causes an act to be done, which if directly performed by him or another, would be an offense against the United States, is punishable as a principal (R. 1768).

This charge is similar to that given by the Trial Court in *Nye & Nissen v. United States*, 336 U.S. 613, 628.

This Court, in the dissent written by Mr. Justice Frankfurter, declared that

> "only when a jury has been properly instructed to the relevant standards to be applied to the evidence, does a basis exist for determining whether evidence sufficient to support the verdict was presented to it. See *Bollenbach v. United States*, 326 U.S. 607, 613-615." (page 624)

and in the dissent by the late Mr. Justice Murphy it was pointed out in this same case that,

> "The jurors were not told what the terms 'counsel' or 'induce' signified. Abetting, in the context of the substantive crimes was not defined. Most important, the jurors were not told how to use a belief that conspiracy existed as evidence in itself of the substantive crimes. There was no attempt to sketch differences between abetting, counseling inducing and conspiring." (p. 628)

Petitioners specifically requested the Trial Court to define the terms "counsel" and "induce" (R. 1791). In reply to such request, the Trial Court stated,

> "I think the proper charge has been given on conspiracy and I believe this will be confusing. I deny No. 19 for that reason." (R. 1799)

Thus, as stated by the late Mr. Justice Murphy in *Nye & Nissen v. United States*, *supra*.

> "When the magic words 'counseling' or 'inducing' are injected to also 'define' the substantive crimes, the danger and its consequences reach a new high."

The entire purport of the Court's instructions was to emphasize to the Jury that no matter what Petitioners could do in the operation of their business, one thing they could not do under the law—conspire to do the things denounced in the Statutes with which they were charged if requisite intent was proved. The question of counseling, inducing and conspiring was manifestly excluded from the jury's consideration. Such construction of the statutes without inclusion of these basis constituent elements of the offense as enunciated by this Court was serious and prejudicial error. *Bollenbach v. United States*, 326 U.S. 607, 613; *United Brotherhood v. United States*, 330 U.S. 395, 410.

If error in failure to submit salient issues to the jury may be easily disregarded then the constitutional right to jury trial is in grave peril. *Tumey v. Ohio*, 273 U.S. 510, 535.

Involved here is a basic and fundamental right given all persons charged in a criminal trial in the United States Courts—the right to a fair determination of guilt or innocence, as well as unhampered instructions to the jury defining the terms and language making up the offense denounced.

The record establishes that these rights were not accorded Petitioners.

C.

Petitioners were prejudiced by statements by the prosecutor in his summation which had no support in the record.

The practice of a prosecutor "assuming prejudicial facts not in evidence," was condemned in *Berger v. United States*, 295 U.S. 78, 84. The Courts rationale for strictly regulating the prosecutor's conduct in this respect was that:

> "It is fair to say that the average jury in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."
> (At page 88)
> See also, *United States v. Georgia*, 210 F. 2d 45.

The prosecutor in this case in his summation without factual foundation in the record, stated:

> "I have put a lot of time in this case. I have worked hard on it, but even so I sincerely ask you to go out and render what you consider a proper verdict. *I'll be frank with you, I think the verdict is guilty on all three, on all counts.*" (R. 1755)

Petitioners' counsel objected to the prosecutor expressing his personal opinion and belief of "guilt" on the part of Petitioners and in addition moved the Court for a mistrial because of the harm and undoubted prejudice that was generated by such argument. Both the objection and exception to the argument and the motion for mistrial were denied by the Trial Court (R. 1757).

The nature of this argument caused one of the Judges in the Court below, in concurring specially, to state that:

> "I do not think that the argument quoted in footnote 2 to the majority opinion should be commended. For the prosecuting attorney to express his personal opinion or belief in the guilt of the accused, seems to me unfairly to add on the Government's side of the scales the weight of the professional opinion and the influence of the official position of Government Counsel * * *." (R. 1859)

This argument was wholly improper for many reasons, particularly because Petitioners had no opportunity to cross-examine what was, in effect, unsworn testimony. The prosecutor attempted to testify to his belief and his personal opinion as to Petitioner's guilt, which would be rejected as opinion testimony. These remarks by the prosecutor cannot be excused on the ground that they were provoked by counsel for Petitioner. To advance such position is simply to say that if counsel for accused violates a rule, the Government's counsel can also reply by offering other illegal evidence.

It is clear that in spite of any admonition which the Trial Court gave the jury, that these remarks are not of the type that Jurors could "put out of their minds" simply by being told to do so. Hence, the forensic misconduct complained of constitutes reversible error.

As a means of preserving the substantial rights of Petitioners and as a guarantee of the fairness of their trial, reversal should be granted irrespective of provocation, if such exists. Where the remarks, as here, are so improper as to require reversal by other standards, it

does not matter who was originally to blame; for though the jury may have realized that the argument by the prosecutor was in reply to one by the defense, it does not follow that such misconduct will be discounted even if it is persuasive in itself. *Miller v. United States*, 287 F. 864, 867, is authority for the proposition that reversal should prevail regardless of provocation.

An unfair criminal trial arouses as much alarm as the outrageousness of the crime charged. In making a criminal trial a matter of discovery for the truth, rather than a contest of attorneys, a delicate balance must obtain between preventing crime and protecting the civil liberties of the accused.

Always the arms employed by the prosecutor should be that of the warrior and not that of the assassin. Weighing this case in its entirety, the statement by the prosecutor demonstrates due regard for a fair trial and preservation of the substantial rights of Petitioners; did not water this procedure. In *United States v. Toscano*, 166 F. 2d 524, a narcotics conviction was reversed, although the only unfounded statement by the prosecutor in summation was that the Government's experts felt that defendant's fingerprints "might have been" on the package containing narcotics. (p. 527) The reversal in the cited case (*Toscano*) represents a situation much less questionable than that here involved.

The judgment rendered is one that lies completely beyond the boundaries of due process as generally understood and applied.

Conclusion

For the reasons stated, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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APPENDIX "A"

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 17804

CLEVELAND LESTER THOMPSON, JR., EDWARD LEE HARSHBERGER and J. M. PROCTOR, JR., *Appellants,*

VERSUS

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the Southern District of Texas

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(December 14, 1959)

Before RIVES, Chief Judge, and HUTCHESON and TUTTLE, Circuit Judges.

HUTCHESON, Circuit Judge: Convicted on five counts of a seven count indictment and sentenced to two years on each count, the sentences to run concurrently, defendants, here upon two points of error, urge upon us that they were convicted upon procedures which offend due process of law.[1]

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[1] (1) Improper argument by prosecutor denied appellants of their substantial rights and of a fair trial.

(2) The trial court failed to fully and adequately instruct the jury on the law of the case.

In support of their first point, appellants, quoting from the closing argument of the prosecutor,[2] argue that, within the authorities[3] on which they rely, the prosecutor, stating his personal belief in appellants' guilt, in effect gave unsworn and inadmissible opinion testimony without defendants' having the privilege of cross-examining him.

In support of their second point, appellants, conceding that the charge was correct, complain that the court erred in failing to define for the jury the words "counsel" and "induce" used in the instruction to the jury[4] and to point out therein the differences between abetting, counseling, inducing, and conspiring, used in the charge.

In short, appellants invoking the principle, and citing cases holding, that it is the duty of the district judge to instruct the jury on all essential questions of law involved, including giving definitions, whether or not it is requested to do so, insist that the judge failed in this duty.

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[2] "I have put a lot of time in this case. I have worked hard on it, but even so I sincerely ask you to go out and render what you consider a proper verdict. I'll be frank with you. I think the verdict is guilty on all three on all counts."

[3] Steele v. United States, 222 F(2) 628; Ginsberg v. United States, 257 F(2) 950; Hanford v. United States, 249 F(2) 295; Wagner v. United States, 263 F(2) 877.

[4] "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal, and whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Finally, in a kind of scattergun fashion and without, as they were in law required to do as a predicate to assigning error on the refusal to give them, pointing out why and wherein they are erroneous, appellants make the general complaint that it was error to refuse their requests for special instructions Numbers 3, 4, 5, 6, 7, 10, 11, 12, 13 and 14.

Answering the first point of error, appellee denies that the argument complained of was in anywise improper, and further insists that if it was error to make the statement, which is denied, the error was harmless. Pointing out that the line which the prosecutor may not take in his argument is suggesting or arguing to the jury his personal opinion as to defendants' guilt, based not upon the evidence in the record and the construction and interpretation of it but upon matters not disclosed therein, appellee, with confidence, affirms that he is not prohibited from stating arguendo as an advocate his view of the weight and effect of the evidence.

In addition, calling attention to the fact that, while defendants did object to the statement of the prosecutor and did ask for a mis-trial, when the court stated to defendants' counsel that if they wished it, he would instruct the jury that the statement of the prosecutor was given, and should be taken, merely as argument, the counsel declined the offer, saying, "I think I will just stand on my bill."

Opposing to appellant's second claim of error, its own counter point 2, "The instructions to the jury were adequate, fair and proper. The denial of the requests for further instruction was not error", appellee urges upon

us: that, the issues were properly submitted and in a manner as favorable to defendant as the law permitted; and that defendants' complaint that it was error not to attempt definition of the clear and simple words used in the charge is without substance, as is its attack upon the district judge for failing to give in charge to the jury the many instructions presented and asked for in bulk without pointing out below and here why and wherein, in the light of the general charge, it was error not to give them.

For the reasons hereafter briefly set forth, we find ourselves in complete agreement with appellee's views; that the case was fairly tried and fairly submitted to the jury; that the matters complained of do not constitute error; and that no plain error appearing, the judgment should be affirmed.

We agree with appellants and have often declared, note 3, *supra*, that argument for the prosecution going beyond proper bounds may not properly be condoned, and that, when prejudicial, it may constitute reversible error. This does not, of course, mean, and we and other courts have not held, that the prosecutor may not "ask the jury for a conviction", *Henderson v. United States*, 218 F(2) 14. In the same case it was said:

> "It is of course permissible for the district attorney to ask the jury for a conviction * * *. In doing so, the district attorney has the right to summarize the evidence and urge upon the jury all reasonable inference and deduction from the evidence. It is not misconduct on his part to express his individual belief in the guilt of the accused, if such belief is based

> solely on the evidence introduced and the jury is not led to believe that there is other evidence known to the prosecutor but not introduced justifying that belief."

In *Schmidt v. United States*, 237 F. 2d 542, where the argument complained of was: "I believe in the guilt of these two defendants under the evidence.", the court, holding that the argument was not improper, thus stated the correct rule:

> "It is not misconduct for a district attorney to express his personal belief in the guilt of a defendant, if such belief is expressly based as it was here on the evidence, and the jury is not led to believe that the district attorney is basing his belief on evidence not in the record."[5]

In the light of these authorities and many others, including *U. S. v. Socony Vacuum*, 310 U.S. 150, holding that each case must stand on its own facts, we think it hypercritical, to claim that the language of the prosecu-

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[5] To the same effect is this quotation from U. S. vs. Holt, 108 F(2) 365:

> "The district attorney, in his argument to the jury should confine himself to a discussion of the facts disclosed by the evidence or legitimate inferences deducible therefrom. He has the right to denounce a defendant as guilty of crime charged, if the evidence fairly tends to prove his guilt and to draw inferences unfavorable to the defendant, if based on the evidence and such circumstances as reflect unfavorably on the defendant."

and this from U. S. v. Klein, 187 F(2) 873:

> "It is hypercritical to say that because, in discussing testimony and its effect, a district attorney used the words 'I know' [and we may add 'I think'], he is thereby testifying on behalf of the prosecution . . ."

tor in this case was error at all, much less prejudicial and, therefore, reversible, error.

Finally, on this score, we think that if the language used might be regarded as having gone far enough beyond the bounds of legitimate argument to make proper the court's statement to defendant's counsel that if he wished the court to do so it would instruct the jury in effect that the statement was made as argument and should be so taken by the jury, it is too plain for argument that counsel's reply, "No, sir, I think I will just stand on my exception.", showing that he was more interested in preserving the exception intact than in obtaining relief, rendered the error, if any, completely harmless.

The same is to be said of appellants' point No. 2, claiming that the court erred: specifically, in not defining the words "counsel" and "induce", used in the paragraph of the charge set out in note 4, *supra*, and, generally, in not giving in the charge to the jury the mass of special instructions numbered 3 to 14, omitting only numbers 8 and 9, tendered to the judge without stating why they ought to have been given or wherein the general charge was deficient in respect of the matters dealt with in the requested instruction. Relying entirely on the established and generally recognized principle that in sending a criminal case to the jury the district judge, whether or not requested to do so, must instruct the jury upon the law of the case, appellants cite no cases which, under the undisputed facts of record, in any way support, or tend to support, the propositions they advance here. We have found none for the plain and simple reason, we think, that there are none. These

propositions are: (1) that it was essential for the court to define words of clear and simple import and generally understood meaning, such as "counsel" or "induce", and (2) that error can be predicated, on this record, upon the refusal of the appellants' special charge.

Agreeing fully with appellants that a case must be correctly charged to a jury and that failure to give an instruction essential to a correct understanding by the jury of the case would be prejudicial error, we think it may not be doubted that it is settled law: that not every failure to charge is such reversible error; that indeed the contrary is true. Cf. *Cave v. United States*, 159 F(2) 468, where it is said:

> "Rarely ever will the trial court's judgment be reversed for failure to give instructions in the absence of a seasonable request or exception (citing cases), and then only if the failure to instruct constitutes a basic and highly prejudicial error."

Cf. also *Wheeler v. United States*, 190 F(2) 663; *Maynard v. United States*, 215 F(2) 336; *Byas v. United States*, 182 F(2) 94; *Banks v. United States*, 223 F(2) 884.

As an additional commentary on the non-essentiality to appellants' defense, of the definitions requested by their counsel, attention is called to the record showing that when, in response to the district judge's suggestion to counsel that if he wished such definitions to be given he could prepare and present for the judge an appropriate charge, the counsel failed and refused to do so. We are in no doubt that this specific claim of error is wholly unsubstantial, and we think that the same

thing is true of the claims of error, baldly predicated on the fact that defendants requested special charges and the court did not give the lot of them.

No reversible error appearing, the judgment is

AFFIRMED.

RIVES, Chief Judge, Concurring specially:

I do not think that the argument quoted in footnote 2 to the majority opinion should be commended. For the prosecuting attorney to express his personal opinion or belief in the guilt of the accused seems to me unfairly to add on the Government's side of the scales the weight of the professional opinion and the influence of the official position of Government counsel who, in most cases, is properly and highly respected by the members of the jury for his integrity, fairness, and impartiality. Such an argument should not in my opinion, be made, and I think that in many cases it would call for a reversal whether or not there was any intimation that the prosecutor based his belief on evidence not in the record. The views expressed in the able dissenting opinion of Judge McAllister in *Henderson v. United States*, 6 Cir., 1955, 218 F.2d 14, 20, et seq., are impressive and are amply supported by many cases contained in the annotation appended to that case in 50 A.L.R. 2nd, pp. 766-868, on "Propriety and effect of prosecuting attorney's argument to jury indicating his belief or knowledge as to guilt of accused." See also 53 Am.

Jur., Trial, Section 486; 23 C.J.S. Criminal Law, Section 1104.

In this case, however, the entire argument appears in the record. It is a logical and reasoned argument containing nothing else subject to criticism and no appeals to passion or prejudice. The one improper argument is not, in my opinion, so serious as to require a reversal of the judgment. As said in *United States v. Socony-Vacuum Oil Co.*, 1940, 310 U.S. 150, 240,

> "But each case necessarily turns on its own facts. And where, as here, the record convinces us that these statements were minor aberrations in a prolonged trial and not cumulative evidence of a proceeding dominated by passion and prejudice, reversal would not promote the ends of justice."

I, therefore, concur in the affirmance of the judgment.

A true copy.

Test:

EDWARD W. WADSWORTH
Edward W. Wadsworth
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana

(SEAL) Jan. 28, 1960

APPENDIX "B"

JUDGMENT

Extract from the Minutes of December 14, 1959

CLEVELAND LESTER THOMPSON, JR., EDWARD LEE HARSHBERGER and J. M. PROCTOR, JR.,
No. 17804 versus
UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Rives, Chief Judge, Concurring specially."

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 18 1960
JAMES R. BROWNING, Clerk

No. 715

In the Supreme Court of the United States

OCTOBER TERM, 1959

CLEVELAND LESTER THOMPSON, JR., EDWARD LEE HASSCHEIDER, AND J. M. PROCTOR, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
Assistant Attorney General,
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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-24; R. 1852-1859) is reported at 272 F. 2d 919.

JURISDICTION

The judgment of the court of appeals was entered on December 14, 1959 (Pet. App. 26; R. 1861). A petition for rehearing (R. 1862-1864) was denied on January 22, 1960 (R. 1869). The petition for a writ of certiorari was filed on February 18, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly refused to order production of grand jury testimony sought by

defense counsel for possible impeachment of a government witness.

2. Whether the court erred in its charge in using the words "counsel" and "induce" (taken from the aider and abettor statute (18 U.S.C. 2)) without expressly defining them.

3. Whether the prosecutor's statement in his closing argument that he thought the verdict should be guilty constituted reversible error.

STATUTES INVOLVED

18 U.S.C. 656, 62 Stat. 729, provides:

> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> * * * * * *

18 U.S.C. 1005, 62 Stat. 750, provides:

> Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, national bank or insured bank, without authority from the directors of such bank, issues or puts in circulation any notes of such bank; or
>
> * * * * *
>
> Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System—
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.
>
> * * * * *

STATEMENT

Petitioners were charged in count 1 of an indictment returned in the United States District Court for the Southern District of Texas with a conspiracy to violate 18 U.S.C. 656 and 18 U.S.C. 1005 (*supra*, pp. 2–3), by embezzlement of the funds of a federally-insured bank and making false entries in its books (R. 6–16). Counts 2, 4, and 6 charged the petitioners with substantive violations of 18 U.S.C. 656, and counts 3, 5, and 7 charged substantive violations of 18 U.S.C. 1005 (R. 16–22). Petitioners were convicted on all counts except 4 and 5, of which they

were acquitted (R. 1802–1803). Each was sentenced to two years' imprisonment on each of counts 1, 2, 3, 6, and 7, to run concurrently (R. 1806–1810). On appeal (R. 1811–1812, 1818–1819, 1826–1827), the convictions were affirmed (Pet. App. 26; R. 1861).

The general pattern of the petitioners' illegal operation, as proved by the government's evidence in regard to numerous sales of repossessed automobiles, is shown by the evidence under count 1, the conspiracy charge (R. 6–16). From May 1956 through July 1957, petitioner Thompson was employed at the Texas National Bank as an installment loan clerk to collect on loan accounts owned in part by this bank, which loans were secured by liens on automobiles. If the accounts became delinquent it was his duty to repossess the automobiles. The charge was that Thompson conspired with petitioners Proctor and Harschberger, automobile repossessers, to report to the bank lesser amounts of money received on such collections and repossessions than had actually been received, and to embezzle the difference.

Since petitioners make no challenge as to the sufficiency of the evidence, we limit our statement to the parts of the record involved in their contentions, in the same order in which they raise them.

1. Mrs. Maynor was a government witness who had worked as a skip tracer and general office worker for Harschberger and Proctor in January 1956. She left when they said that their automobile repossession company, then known as Coastal Auto Detective Bureau, at 910 Gray Street, was losing money (R. 314–316). She was re-hired by Harschberger and Proc-

tor shortly after July 4, 1956 (R. 317–318). A few days later, Harschberger, in the presence of Proctor, introduced her to Thompson, saying "This is Tommy, our silent partner" (R. 319). Thompson came to the office almost every day during the period when Mrs. Maynor knew that he was an employee of the Texas National Bank (R. 327, 364). Thompson instructed her how to make out Texas National Bank repossession invoices and sometimes helped in their preparation (R. 334–336).

Mrs. Maynor was asked to identify a number of checks which had already been introduced in evidence (R. 344–349). She identified a list of repossessions for the Texas National Bank she had drawn up from her records (R. 350–353). She testified that once Thompson told her he and Proctor were going to "have it out" with Harschberger, who was getting more than his share, and that she went home to avoid the unpleasantness. Subsequently, Thompson told her the matter had been adjusted (R. 367–369, 449–450).

On cross-examination, Mrs. Maynor testified that Proctor had directed her to tell F.B.I. Agent Parke what she knew and to help him in any way possible in his investigation (R. 383). She prepared for Parke a list of repossessed automobiles (R. 387–389) and delivered to him the office receipt book (R. 390). She gave a carbon copy of the list to Proctor (R. 389). She testified that she believed certain writing in Gov. Ex. 170, a repossession journal, was in Thompson's handwriting, but said she knew his signature and not his handwriting (R. 402–404). Throughout her cross-examination, she testified that

she could not be specific as to dates (*e.g.*, R. 389, 392, 448), such as when the argument occurred (R. 450).

After several re-direct and re-cross-examinations of the witness, petitioners requested that the court permit an inspection of the grand jury minutes of Mrs. Maynor's testimony to determine her veracity (R. 487–489). The court examined this testimony consisting of one and a half typewritten pages and stated that "there is not much difference in what she has testified to here and certainly not as extensively" (R. 517). The court denied the request for the grand jury testimony (R. 517–519).

2. During its final charge to the jury, the trial court instructed in part (R. 1768):

> Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal, and whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The court defined aiding and abetting (R. 1768). Shortly thereafter, the court read pertinent parts of the substantive statutes involved (18 U.S.C. 656 and 1005), and in the charge on the substantive counts used the pertinent language—"aid, abet, counsel, command, induce and procure" (R. 1770–1776). This was followed by a separate charge as to count 1, the conspiracy count (R. 1776–1782).

While the court was considering objections to the charge as given, this colloquy occurred (R. 1791–1792):

The COURT. I think the jury has been properly instructed on conspiracy.

Mr. GOLDING [counsel for Harschberger and Proctor]. To which we except. Also, named defendants except and object to the Court's charge because the jurors are not told what the terms "counsel", "induce", signify. Further, said named defendants object and except to the Court's charge because the jurors are not told how to use a belief that conspiracy existed as evidence in itself of the substance of crimes. Further, said named defendants except and object to the charge of the Court because there is no attempt to sketch differences between abetting, counseling and conspiring.

The COURT. Do you have a charge that you request be given?

Mr. GOLDING. No, sir; because I think they are fundamental. I think they are part of the——

The COURT. If you have a charge to request I will consider it.

Mr. GOLDING. I have none. * * *

3. Just before the closing of the government summation, the prosecutor stated (R. 1755):

I have put a lot of time in this case. I have worked hard on it, but even so I sincerely ask you to go out and render what you consider a proper verdict. I'll be frank with you. I think the verdict is guilty on all three on all counts. You may differ, but at least we are differing under an American process—under the American process. * * *

No defense objection was made at the time of this statement. After the jury had been excused to await

the court's final charge, this colloquy occurred (R. 1756–1757):

> Mr. GOLDING. Defendants Harshberger and Proctor object to the statement contained in the closing argument of the prosecutor, "I think the verdict should be guilty." Because same constitutes a personal expression and conviction of the prosecutor. This is an invasion of the province of the jury.
>
> * * * * *
>
> The COURT. What do you request? What right do you claim for your client by virtue of it? Do you claim a mistrial or acquittal or what?
>
> Mr. GOLDING. A mistrial, Your Honor. I do not think the prosecutor has any right, any more than I would, to express the personal belief of the guilt of the defendants.
>
> The COURT. Well, I think it is stated as argument and I will so instruct the jury if you wish.
>
> Mr. GOLDING. No, sir; I think I will just stand on my exception to the ruling of the Court.

ARGUMENT

1. Contrary to petitioners' contention (Pet. 7–10), the trial court did not err in refusing to produce the grand jury testimony of government witness Mrs. Maynor, for use by defense counsel in further cross-examination of her at the trial. Petitioners did not consider the point important enough to raise on appeal until their petition for rehearing in the court of appeals.

The decision of this Court in *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 398, establishes that grand jury minutes are not subject to production as of right on demand under 18 U.S.C. 3500, but may be ordered produced, in the discretion of the trial court, only when there is particularized need therefor. Here, petitioners showed no such particularized need. They had extensively cross-examined the witness before demand was made. The court examined the one and a half pages of grand jury minutes which represented her testimony and stated that it was not essentially different from her testimony at the trial but was much less extensive.

Mrs. Maynor was not the key government witness. The government called numerous witnesses whose cars had been repossessed and who each testified that his car was in better condition than was reflected on the repossession memoranda of the bank.[1] Seven wholesalers testified to the prices they had paid for cars.[2] In most instances, their testimony was supported by documentary evidence of their checks and records. Government's Exhibit 170 was a bank record under the control of petitioner Thompson which showed the lesser amounts received by the bank for the repossessed cars. That notations in Government's Exhibit 170 were in part in Thompson's handwriting was proved by witnesses other than Mrs. Maynor and admitted by Thompson himself (see R. 1366–1368).

The only real significance of Mrs. Maynor's testimony was to the effect that Thompson considered

[1] R. 292, 501, 659, 677, 701, 812, 830, 972, 984, 994.

[2] R. 549, 727, 1016, 736, 763, 879, 864, 938.

himself and was treated as a partner by the other two. There was also other testimony as to this. Government witness, Mrs. Jeffries, testified that, when she was opening a bank account for Coastal Auto Recovery Bureau for Proctor and Harschberger, the latter told her that Thompson was a silent partner. She then crossed out his name and wrote in "silent partner" on the card (R. 263–268). Government witness Williams testified that Harschberger told him that Thompson had a one-third partnership interest in the company with Proctor and Harschberger (R. 549, 560, 605). Moreover, Mrs. Maynor's testimony as to Thompson's participation was not vague, except as to specific dates—hardly a basis for inferring unreliability.

Considering the extensive documentary proof in this case showing clearly the fact that money on repossessed cars was not turned over to the bank, petitioners' unsupported statement (set forth as a quotation without attribution, see Pet. 7) that the jury could not have convicted unless it believed Mrs. Maynor is wholly unfounded.

2. There was no error by reason of the trial court's failure to define the terms "counsel" and "induce," as used in the charge in relation to the substantive counts (see Pet. 10–12).

"Counsel" and "induce" are ordinary words used by the average person in everyday conversation, and there is no reason to believe that the jurors did not understand their meaning. There is no requirement that a court shall explicitly define words which are not obscure, ambiguous, or technical, and can reason-

ably be expected to be within the comprehension of the average layman. Cf. *Wheeler* v. *United States*, 190 F. 2d 663 (C.A.D.C.); *Byas* v. *United States*, 182 F. 2d 94, 96–97 (C.A.D.C.); *Banks* v. *United States*, 223 F. 2d 884, 888–889 (C.A. 8), certiorari denied, 350 U.S. 986; *Shreve* v. *United States*, 103 F. 2d 796, 812 (C.A. 9), certiorari denied, 308 U.S. 570. Significantly, while objecting to the failure to define the terms, counsel refused to submit a proposed instruction (R. 1791–1792; *supra*, pp. 6–7).

Moreover, the judge clearly separated the charge on aiding, abetting, counseling, etc., relating solely to the substantive counts (R. 1770–1776) from that relating to the conspiracy charge (R. 1776–1782). The jurors were instructed that a separate offense was charged against each defendant in each count of the indictment, and that each offense and the evidence applicable to it should be considered separately (R. 1785–1786). The conspiracy count, without more, can support the sentences imposed.

3. There is likewise no merit to petitioners' final contention that a mistrial should have been granted because of the prosecutor's statement that the verdict should be guilty (Pet. 13–15). Only this one isolated part of the prosecution's closing argument is attacked, *i.e.*, "I'll be frank with you, I think the verdict is guilty on all three on all counts" (R. 1755). As Judge Rives pointed out (Pet. 25), the argument as a whole (see R. 1648–1687, 1736–1756) contained a temperate analysis of the evidence. There were no foul blows or impassioned pleas not supported by the record, such as were denounced in *Berger* v.

United States, 295 U.S. 78. In our view, even in its immediate context the challenged remark was not improper, since the preceding and following sentences advised the jurors to return what they considered a proper verdict, although they thereby disagreed with the government's position. There was nothing in the challenged argument to mislead the jury into a belief that the prosecutor was testifying or that he had personal knowledge as to other evidence not introduced in the record.[1] Accordingly, it was permissible in the circumstances here for the prosecutor to express his individual belief in the petitioners' guilt. Cf. *Henderson* v. *United States*, 218 F. 2d 14, 19 (C.A. 6), certiorari denied, 349 U.S. 920; *Schmidt* v. *United States*, 237 F. 2d 542, 543 (C.A. 8); *United States* v. *Holt*, 108 F. 2d 365, 370 (C.A. 7), certiorari denied, 309 U.S. 672.

Even if it be assumed that the prosecutor's challenged remark was erroneous, it was at most a "minor aberration" in a long trial, not warranting reversal. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239–240; *United States* v. *Pietch*, 110 F. 2d 817, 822 (C.A. 10), certiorari denied, 310 U.S. 648. As the court below pointed out, rejection by defense counsel of the court's offer to instruct that the specific remark was made as argument (*supra*, p. 8) showed "that he was more interested in preserving the excep-

[1] In *United States* v. *Tateana*, 466 F. 2d 524, 527 (C.A. 2), relied upon by petitioner (Pet. 15), unlike the situation here, the improper statement in the prosecutor's argument was a "seriously injurious reference to incriminating matter not in the record * * *."

tion intact than in obtaining relief [and] rendered the error, if any, completely harmless" (Pet. App. 22). In its final charge, the trial court instructed that "Statements and arguments of counsel are not evidence in the case * * *" (R. 1763); "You are to consider only the evidence in the case" (R. 1764); and "Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case" (R. 1787). The jury was therefore made aware that the prosecutor's statement was argument and not evidential testimony.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
MALCOLM RICHARD WILKEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

MARCH 1960.

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